Supreme Court, U.S.
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No. 10-1063 FEB 23 2011

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In The

Supreme Court of the United States

ARTHUR STEWARD,

Petitioner,

v.

TOWN OF PARADISE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A State Court's power to preclude a litigant's remedies for violation of Federal Constitutional rights should not turn on a summary factual definition contrived by a State Judge. Federal oversight must be retained to protect citizens from local governmental overreaching.

The questions presented are:

1) Must an *England** reservation be expressed or may it be implied by Plaintiff refraining from raising Federal Constitutional questions in State Court litigation?

2) Does the failure of a State Court to decide issues of Due Process and Fifth Amendment taking of real property create claim preclusion preventing Plaintiff from bringing an action in Federal Court?

3) Does this Court's decision in *Migra*** expand judgments to in affect engulf Federal Law and the power of the Federal Courts to hear issues of federal importance particularly those involving issues of taking and Equal Protection under 42 U.S.C. §1983?

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* *England v. L.A. State Bd. of Med. Exam'rs*, 375 U.S. 411, 417, 85 S.Ct. 461, 11 L.Ed.2d 440 (1964).

** *Migra v. Warren City School District Bd. of Education, et al.*, 465 U.S. 75, 104 S.Ct. 892 (1984).

QUESTIONS PRESENTED FOR REVIEW
– Continued

4) If a Federal Court may enjoin a State Judicial Proceeding*** why is the Federal Court precluded from re-examining state decisions once their Constitutional mischief has been accomplished by rendering a judgment?

*** *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

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All of the parties to this proceeding are listed in the caption.

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OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit has not been reported and is reprinted in the Appendix as Appendix A.

The Decision Order of the United States District Court for the Eastern District of California granting summary judgment in this case has not been reported. It is reprinted in the Appendix hereto as Appendix B.

JURISDICTION

On December 7, 2010 the Ninth Circuit Court of Appeals filed its Memorandum Opinion affirming the district Court's opinion.

The Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Fifth Amendment To The United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual

service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment To The United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a Statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

In 1984, Steward purchased a two acre parcel of real property improved with a single family residence. The residence address was: 6259 Berkshire Lane in Paradise, California. The residence property was separated from Berkshire Lane by a narrow strip of land reserved as a railroad right-of-way. Steward crossed over the railroad right-of-way by permission pursuant to a license from the railroad in order to access Berkshire Lane.[1]

In 1988, the Town of Paradise claimed it purchased Fee Title to the railroad right-of-way from the railroad. The adjacent railroad right-of-way and

[1] The railroad abandoned its use as a railroad many years previously, removed its track leaving the right-of-way idle.

Berkshire Lane were thereafter unified under title or ownership of the Town until October 15, 2003. The Town thereafter proceeded to construct a pedestrian-bicycle thoroughfare, and in the process removed Steward's access to Berkshire Lane.

The acquisition of title by the Town coincided with the Town's forcible removal of Steward's access over the right-of-way to Berkshire Lane, and in fact, land-locking Steward's two acre parcel.

The Town refused to compensate Steward for its confiscation of his access to a public street.

In 1989, Steward filed suit in Butte County Superior Court alleging property damage, fraud, conspiracy, trespass, negligence, declaratory relief, and loss of use of real property (ER 46). In 1991, an Amended Complaint was filed alleging additional causes of action: conversion, inverse condemnation, violation of Constitutional Rights[2] (ER 66).

During the ensuing years, the litigation was tried in stages beginning with a 1993 ruling that the railroad possessed only an easement, that the Title to the railroad right-of-way vested in one Rosslyn Jones, and that Steward possessed no property interest in the crossing (ER 88).

---

[2] The constitutional claim raised the state law issue that the Town did not comply with giving proper notice prior to removing Steward's crossing.

In 1997, the California Third Appellate District issued its opinion affirming that Steward had no property interests in the crossing of the railroad right-of-way. The Appellate Court also determined that all other causes of action arising out of Steward's 1989 complaint as amended by the First Amended Complaint, remained undecided and viable because of a stipulation bifurcating those issues (ER 93).

In 1999, Steward filed a Quiet Title action to the real property underlying the crossing which had been removed by the Town in 1988. On October 15, 2003, following a jury trial, Title was quieted in Steward in fee (ER 146). The Town appealed the Quiet Title judgment which was affirmed on appeal (ER 150).

B. The District Court Proceedings

On November 3, 2008, Steward filed a complaint for damages in the U.S. District Court, Eastern District of California alleging: (1) Taking of property without Due Process, 42 U.S.C. §1983; (2) Inverse condemnation (ER 18). Defendant Town moved for summary judgment and on September 2, 2009, the District Court issued its order that all of Plaintiff's claims are claim precluded by prior State Court judgments (ER 2). (Appendix B)

C. The Court Of Appeals Proceedings

Steward timely filed Notice of Appeal (ER 223). On December 7, 2010, the Ninth Circuit Court of Appeals issued a memorandum decision affirming the

granting of summary judgment by the District Court. (Appendix A)

In all of the considerations given this case under both the state and federal proceedings, the Courts assumed because the railroad right-of-way lay between 6259 Berkshire and Berkshire, Steward was not an abutting or appurtenant owner. In fact, between 1988 and the Quiet Title judgment of 2003, the Town was the alleged owner of all the property directly adjacent to 6259 Berkshire. No authority has contended that installing a bicycle/pedestrian path between private property and a street makes it any less "adjacent". When Steward quieted title to the property underlying the railroad right-of-way, he was still "adjacent" to Berkshire.

By engaging in the mislabeling of 6259 Berkshire as not adjacent, the fiction took control of the reality. The authorities cited herein clearly make Steward's property abut the "bikeway thoroughfare" as well as Berkshire.

And this takes us to the mischief of issue preclusion. When the towns, cities or states want your property, can they take it without federal oversight or review? Can they by redefining a word here and there preclude enforcement of constitutional remedies?

REASONS WHY CERTIORARI SHOULD BE GRANTED

News reports, as well as court dockets contain reference to growing tension between what is increasingly viewed as state sovereignty and strong movements to disable federal authority where state law and judicial proceedings are concerned. The present state of the law of issue preclusion has grown to engulf the right of a citizen to assert his property rights in Federal Court.

An owner of property abutting upon a public street has a right of access over the street and from his property. *People Ex Rel. Department of Public Works v. Russell*, 48 Cal.2d 189, 195 (1957); *Bacich v. Board of Control of California*, 23 Cal.2d 343, 349-350 (1943). The owner of property is entitled to compensation for impairment of that right. *Bacich v. Board of Control*, 23 Cal.2d 343, 349-351; *Orpheum Building Company v. San Francisco Bay Area Rapid Transit District*, 80 Cal.App.3d 863, 868-874 (1st Dist. 1978). The right consists in access for ingress and egress from the property to the public street abutting the property and access to the general system of public streets in a reasonable manner. *People Ex Rel. Department of Public Works v. Ayon*, 54 Cal.2d 217, 224 (1960); *Bachich*, *supra*, at 350.

A major change in the grade of the road, such as highway underpasses, overpasses and freeway off ramps which prevents direct access to a property abutting the new construction, is also a substantial

impairment of access. *Brumer v. Los Angeles County Metropolitan Transportation Authority*, 36 Cal.App.4th 1738, 1746 (1995).

Whether the conduct of a public entity has caused a substantial impairment of access is a question for the Court. The determination, however, *involves a factual inquiry* and is reviewed under the "substantial evidence" standard. *San Diego Metropolitan Transit Development Board v. Price Company*, 37 Cal.App.4th 1541, 1547-1548 (4th Dist. 1995); *Perrin v. Los Angeles County Transportation Com.*, 42 Cal.App.4th 1807, 1811-1812 (2nd Dist. 1996). If the Trial Court finds a substantial impairment, then the determination of the extent of the owner's damage *is for the trier of fact. People v. Sayig*, 101 Cal.App.2d 890, 902 (1st Dist. 1951); *People by and through the Department of Public Works v. Becker*, 262 Cal.App.2d 634, 639 (4th Dist. 1968).

A property owner can recover damages for business losses resulting from a substantial and unnecessary impairment of access caused by the construction of public improvements. *Liontos v. County Sanitation District*, 61 Cal.App.4th 726 (2nd Dist. 1998) (recovery of business losses by restaurant for construction in front of restaurant).

Up until 1988 Plaintiff's access to 6259 Berkshire (a city public street) was across the subject railroad right-of-way. Thereafter, the Town wrongfully claimed it had acquired fee title to the right-of-way and removed Plaintiff's crossing from 6259 Berkshire

to Berkshire, thereby removing the only existing access 6259 Berkshire (a lot with a single family dwelling) had to a public street. Cutting off access to a public street effectively destroyed the marketability of 6259 Berkshire. In *Rose v. State of California*, 19 Cal.2d 713 (1942), the Court stated:

> We proceed next to a consideration of the question whether or not Plaintiff has sustained a compensable damage within the meaning of Article I §14 of the California Constitution.
>
> That the owner of property fronting upon a street or highway has appurtenant thereto, certain private easements in the street in front of or adjacent to the lot distinguished from the public easement therein, which are a part and portion of his property and are the private property of the lot owner as fully as the lot itself, is not open to question.
>
> The nature of this property right is described in *Brown v. Board of Supervisors*, 124 Cal. 274 at pg. 280 as: "the property which an abutting owner has in the street in front of his land is the right of access and of light and air and for an infringement of those rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action. . . . In *Eachus v. Los Angeles Cons. L. Ry. Company*, 103 Cal. 614, the right which the abutting owner

> has to the use of the street fronting upon his lot is defined to be an easement therein for the purpose of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as that which he has in the lot itself, and that any act of a municipality by which that easement is destroyed or substantially impaired for the benefit of the public, is a damage to the lot itself within the meaning of the Constitutional provision for which he is entitled to compensation." *Id.* at 727. See also *McCandless v. City of Los Angeles*, 214 Cal. 67; *Eachus v. City of Los Angeles*, 130 Cal. 492.
>
> The abutting owner's easement of access arises as a matter of law and its nature and extent have been set forth in the numerous decisions which have considered the question. Thus, it is established that the easement of access is as a matter of law peculiar to the individual owner, and an unreasonable interference with such an easement is an injury necessarily different from the injury suffered by the general public. It is an easement in the public highway upon which his land fronts. *Rose* at 728.

In *People v. Ricciardi*, 23 Cal.2d 390 (1943), the Court held "but if the obstruction substantially interferes with ingress and egress to the property, considering its nature and the particular uses to which it is adaptable the easement of access is impaired. Citing *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592 (1907); *Lane v. San Diego Electric Ry. Co.*, 208 Cal. 29 (1929);

McCandless v. City of Los Angeles, 214 Cal. 67. In discussing various examples of impairment, the *Ricciardi* Court stated "for example, in *Eachus v. Los Angeles*, *supra*, the Defendant railway company made an excavation in the street in front of the Plaintiff's property which varied in depth from 20 to 28 feet leaving only a 10 foot strip in front of the premises for access. And in *Williams v. Los Angeles Ry. Co.*, *supra*, the construction by the railway company of a switch and signal tower in the street in front of Plaintiff's business premises directly interfered with his right of ingress and egress. Because the railway company in *Lane v. San Diego Electric Ry. Co.*, *supra*, constructed it's track so close to the Plaintiff's land that a vehicle could not be parked in front of it while a streetcar passed by, the Court held that the land owner's right of access was substantially and seriously impaired. Likewise, the construction of a pedestrian subway terminal so that it extended in front of and adjacent to 1/3 of Plaintiff's premises which were zoned for general business purposes, was held in *McCandless v. City of Los Angeles*, *supra*, to be a substantial impairment of the owner's right of ingress and egress.

In *Holtz v. Superior Court*, 3 Cal.3d 296 (1970), the Court stated:

> Defendants primary contention as we understand it, that since under Section 832, a private excavating coterminous owner would not be liable, absent negligence, for the damage occurred by Plaintiff in this case, Defendants, though public agencies, should

> likewise not be liable unless negligent. In thus equating the liability of public and private entities, Defendants ignore, however, the distinct Constitutional source of a public entity's responsibility to compensate for damages resulting from the construction of a public improvement and overlook the unique purpose of the inverse condemnation duty. Article I §14 of the California Constitution, provides that: "private property shall not be taken or damaged for public use without just compensation". . . . and it is this provision, rather than section 832, in which Plaintiff's inverse condemnation claim is fundamentally rooted. Citing *Rose v. California, supra.*

See *Breidert v. Southern Pacific Company*, 61 Cal.2d 659 (1964). (The Supreme Court, Tobriener, J., held that complaint alleging that loss of use of next intersecting street as result of closing of grade crossing substantially impaired right of access and seriously impaired free and full use of property, pleaded a loss which was sufficient to withstand general demurrers.)

See *Shortline Associates v. City and County of San Francisco*, 78 Cal.App.3d 50 (1st Dist. 1978). (*Holding that adjacent property owners could not be required to purchase an easement across a footpath designated exclusively for pedestrian use and connected to the streets since they had a right as a matter of law to access to the public streets.*)

Steward purchased 6259 Berkshire as a lot with a single family home. The only access to a public street was across the existing crossing to Berkshire. The "Town's" act of removing the access to Berkshire violated the legal principal requiring the "Town" to preserve Steward's right to access a public road. Such taking by the "Town" damaged Steward's possessory interests and violated his rights.

In effect, the Court decided that property adjacent to public property, which abutted a public street, was not entitled to access to the public street because it was not an abutting land owner. The summary reasoning of the Trial Court was that a residential property separated from a street surface by a sidewalk (even when the sidewalk is municipal property); would not be "adjacent" to a public street and therefore not entitled to access under decisional law. The reasoning was without support in either reason or law. See *Shortline Associates*, *supra*, at 56 to 58:

> Thus, if the twenty-foot strip of land abutting Plaintiff's property and forming part of Hallidie Plaza is a street, Plaintiffs already had the rights they purchased under protest from the city regardless of the city's intent. Our discussion and decision is confined solely to this strip of land since the remaining components of Hallidie Plaza are not at issue.
>
> Resort may be had to a number of California authorities to determine whether the character of the twenty-foot strip of land abutting

> Plaintiff's lot is equivalent to a street. Among the definitions of "street" are Government Code §65002 in the Planning Law which defines a street to include a "walk" and the State Housing Act (former Health and Safety Code §15030, repealed 1961), where a street means a "park, not less than sixteen (16) feet in width." Various definitions of a "street" appear in the Streets and Highways Code such as "square" and "squares. . . . or places. . . . (Sts. and Hy. Code and §3209 (repealed) and §4008). In the Pedestrian Mall Act, a street means any public 'street, road. . . . or place of any nature open to the use of the public'". (Sts. and Hy. Code §11004). Similarly, Streets and Highway Code §18004.5 refers to "places and ways dedicated to public use" and §18311 refers to a street to include alleys and other public places. *A "pedestrian mall" is another variation of a street*; it is "one or more city streets or portions thereof on which vehicular traffic is or is to be restricted in whole or in part and which is or is to be used exclusively or primarily for pedestrian travel." (Sts. and Hy. Code §11006). *The Tree Planting Act of 1931, Streets and Highways Code §22010 provides: "Street" means all or any portion of territory within a city set apart and designated for the use of the public as a thoroughfare for travel, and includes the sidewalk, the center and side plots thereof.*

Case law has also established that sidewalks are included within the definition of streets. (*Heath v.*

Manson, 147 Cal. 694, 699 (1905); *Marini v. Graham*, 67 Cal. 130, 132 (1885); *Conjorsky v. Murray*, 135 Cal.App.2d 478 (4th Dist. 1955)). Broader and more general definitions are found in *B. and H. Transportation, Co. v. Johnson*, 122 Cal.App. 451, 453 (1st Dist. 1932), where the court held that:

> Roads and highways are generic terms embracing all kinds of public ways . . .

And *Earl v. Dutour*, 181 Cal. 58, 60 (1919), which holds that a street is territory,

> Set apart and designated for the use of the public. (See also, *Watson v. Greely*, 69 Cal.App. 643 (3rd Dist. 1924)).

> The authorities cited above demonstrate that the definition of a street or sidewalk varies broadly according to the context in which the term is used. There appear to be no statutory or decisional authority dealing with similar factual situations, that determine what type of thoroughfare should be considered a "street" in the context of creating abutter's right by operation of law. Thus, this case is a case of first impression. An examination of the diagrams, maps and photographs submitted to the trial court is significant in determining the character of the twenty (20) foot strip of land abutting Plaintiff's property. It is exclusively for pedestrian use and connects to Market Street with Eddy Street and Fifth Street North. It is the most direct method for pedestrian traffic walking east on Market Street to reach Eddy Street.

Similarly, pedestrians walking south on Powell or Fifth Street North and desire to proceed west on Market would find this a convenient and direct route. The area in question serves the pedestrian traffic on the street surface and is distinguishable from the remaining of the Hallidie Plaza that are designed and depicted to serve the transit systems patrons. The recess mezzanine level was designed to be used by both municipal railways and BART patrons for the purpose of gaining access to and exiting from their respective underground transit systems. The character of these facilities is clearly transit oriented as compared to the surface area used generally by all pedestrians. It is therefore clear that the twenty-foot strip of property abutting Lot 9, owned by Plaintiffs is the equivalent of a street for the exclusive use of pedestrians. The Defendants have emphasized that only the property comprising Fifth Street North was formally dedicated by the City and County of San Francisco, while Plaintiffs contend that the city's action constituted and implied dedication. However, it is firmly established that an abutting owner's right to access and light and air is distinct from the public's right. While the public's right may depend on and arise by an express or implied dedication, an abutter's right arises by operation of law and is peculiar and individual to the abutting owner. (*People v. Russell, supra*, 48 Cal.2d 189, 195; *Rose v. State of California, supra*, 19 Cal.2d 713, 727).

California Government Code §65002 defines street as follows:

> *"Street" includes street, highway, freeway, expressway, avenue, boulevard, parkway, road, lane, walk, alley, viaduct, subway, tunnel, bridge, public easement and right-of-way, and other ways.*

The Town argued that:

> By paving and maintaining the trailway, on the subject property since 1988, Town gave constructive notice of the public use of that property. Steward acquired the property in 2002; there is no evidence that prior owner either permitted such use by Town or took steps to enjoin, remove, or prohibit that use. Consequently, Town has met the five (5) year requirement and now has a vested right to continue using the subject property for the recreational trailway purposes. (ER 163)

California Streets and Highways Code §18004.5 states:

> "Street" and any of its variants, mean and include highways, state highways, roads, avenues, boulevards, alleys, parkways and other public places and ways dedicated to public use, or any portion thereof, within a city or along a boundary of a city.

California Streets and Highways Code §22010 states:

> "Street" means all or any portion of territory within a city set apart and designated for the use of the public as a thoroughfare for travel and includes the sidewalks, the center inside plots thereof.

In the present case, at the time of the removal of the driveway between Plaintiff's property and Berkshire Way, the Town of Paradise claimed it owned and controlled the former railroad right-of-way. Once it destroyed Plaintiff's crossing, it installed a pedestrian thoroughfare or right-of-way, essentially a street. Its removal of Plaintiff's access to the street and to the public thoroughfare constituted a taking of Plaintiff's property every bit as much as if Defendant Town had confiscated the entire parcel of two (2) acres. The trial court summary treatment of such an issue lends great weight to Plaintiff's claim that his rights and exhaustion of his rights under California law has led to his right to pursue the claims he has filed in the Federal District Court.

In the present case, at the time of removal of the driveway between Plaintiff's property and Berkshire Lane, the Town of Paradise claimed it owned and controlled the former railroad right-of-way. Therefore, contrary to the Trial Court's factual determination, Plaintiff's property was "adjacent" to a public street since the only land "adjacent" to the

Plaintiff's property was public property of the Town of Paradise. (ER 200-206:22)

CLAIM AND ISSUE PRECLUSION

Adjudication "on the merits" is the cornerstone of the argument of "claim preclusion." Under California law,

> . . . a final judgment, rendered *upon the merits* by a court having jurisdiction of the cause is conclusive of the rights of the parties and those in privity with them and is a complete bar to a new suit between them on the same cause of action. . . . *a judgment not rendered on the merits does not operate as a bar. Goddard v. Security Title Insurance and Guarantee, Co.*, 14 Cal.2d 47, 52-53 (1939). (Emphasis added).

In *Lunsford v. Kosanke*, 140 Cal.App.2d 623 (4th Dist. 1956), the court discussed the issues of res judicata and claim preclusion:

> The doctrine of res judicata rests upon the ground that the party to be affected,. . . . has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to the litigation.

The doctrine of res judicata if applicable to a given case extends the bar of subsequent litigation not only to issues pleaded but also to those that might have been pleaded. *Steiner v. Thomas*, 94 Cal.App.2d 655, 659-660; *Watkins v. Watkins*, 117 Cal.App.2d 610; *Sutphin v. Speik*, 15 Cal.2d 195, 202, an erroneous judgment, under the doctrine, is as conclusive as a correct one (citations omitted). *Dillard v. McKnight*, 34 Cal.2d 209, 214, 11 A.L.R.2d 835, lays down the following rule to test the applicability of the doctrine:. . . . the application of the principal of res judicata in a given case depends upon an affirmative answer to these three questions: Was the issue decided in the prior adjudication identical with the one presented in the subsequent litigation? *Was there a final judgment on the merits*? Was the party against whom the principal is invoked a party or in privity with a party to the prior adjudication? (Citations omitted).

Here the first and third questions must be answered in the affirmative; in other words if there had been a trial and a decision on the merits in the first case, the plea of res judicata would have to be upheld; but at the trial of the first cause there was no final judgment on the merits. This conclusion is based on the fact that the trial judge held in the first case that the complaint was so defective that no evidence could be received under it. *A judgment not rendered on the merits does not operate as a bar. Goddard v. Security Title Insurance and Guarantee, Co.*,

> 14 Cal.2d 47, 52; *Gonsalves v. Bank of American National Trust and Savings Assoc.*, 16 Cal.2d 169, 172; *Campanella v. Campanella*, 204 Cal. 515. (Emphasis added).

A judgment on the pleadings, if it attacks the sufficiency of a complaint stated cause of action is tantamount to a general demurrer. *MacIsaac v. Pozzo*, 26 Cal.2d 809, 812-813 (1945); *Byson v. City of Los Angeles*, 149 Cal.App.2d 469, 472 (2nd Dist. 1957); *Davis v. Santa Ana*, 108 Cal.App.2d 669, 685 (4th Dist. 1952).

It is settled that the doctrine of res judicata precludes parties or their privities from re-litigating a cause of action that had been finally determined by a court of competent jurisdiction. (Cites omitted). However, a judgment not rendered on the merits does not operate as a bar. *Goddard v. Security Title Insurance and Guarantee, Co.*, 14 Cal.2d 47, 52 (1939); *Passanisi v. Merit-McBride Realtors, Inc.*, 190 Cal.App.3d 1496, 1511 (3rd Dist. 1987) as cited by *Koch v. Rodlin Enterprises, Inc.*, 223 Cal.App.3d 1591 (1st Dist. 1990) at 1595, 1596.

As described in *Mycogen Corporation v. Monsanto Company*, 28 Cal.4th 888 (2002) at page 896,

> Res judicata describes the preclusive affect of a final judgment on the merits.

The mischief created in this case came about when the state court precluded a judgment on the merits to inverse condemnation and to amending the complaint to allege a cause of action under 42 U.S.C. §1983 or any other cause of action (ER 183).

Therefore, there is no preclusive effect and the district court should have allowed the case to go forward on the basis that Steward was not given the opportunity in state court to air all of the causes of action that were available to him by the inability to amend his complaint.

As stated in *Allen v. McCurry*, 449 U.S. 90 (1980),

> But one general limitation the court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. *Montana v. United States*, *supra*, at 153, 99 S.Ct. at 973; *Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation*, *supra*, 402 U.S. at 328-329, 91 S.Ct. at 1443.

In 1972, the U.S. Supreme Court addressed a question of whether 42 U.S.C. §1983 expressly authorized exception of the anti-injunction statute so as to permit a Federal Court in a §1983 suit to grant an injunction to stay a proceeding pending in State Court (*Mitchum v. Foster*, 407 U.S. 225, 226, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972)).

In reviewing the legislative history of §1983, the court quoted Representative Perry:

> Sheriffs, having eyes to see, see not; judges having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit jurors act as if they might be accomplices

> . . . all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government injustice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. *Mitchum v. Foster*, *supra*, at 240.

In footnote 31, the *Mitchum* court quotes Representative Coburn as stating:

> The United States Courts are further above mere local influence than the County Courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the state, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . .

Mitchum v. Foster at 242 observed:

> The very purpose of §1983 was to interpose the Federal Courts between the states and the people, as guardians of the people's federal rights – to protect the people from unconstitutional actions under color of state law "whether that action be executive, legislative, or judicial."

If the District Court can, as in *Mitchum*, issue an injunction to stay a miscreant state proceeding, shouldn't it also have the power to correct a State Court once it has completed its erroneous course?

The Ninth Circuit addressed this developing trend in *Los Altos El Grenada Investors v. City of Capitola*, 583 F.3d 674 (9th Cir. 2009) when it held: (a) owner had the right to make an original *England*[3] reservation in State Court, even though no Federal Court had jurisdiction over the federal questions at the moment it was asserted, and the owner could have litigated its federal question in State Court; (b) that the State Court's striking of the original *England* reservation did not have any preclusive affect on claims the owner could assert before a Federal Court; (c) the owner was entitled to make a renewed *England* reservation following the District Court's *Younger*[4] abstention and; (d) striking a renewed reservation did not have preclusive effect.

The *Los Altos El Grenada Investors* court extended the owners right of access to the Federal Court when it stated:

> Even granting full faith and credit to the Superior Court's decision to delete *Los Altos's England* reservation from its complaint, the Superior Court's action cannot have had any "preclusive" affect on the claims *Los Altos* can assert before a Federal Court, because an explicit on-the-record reservation is not required to preserve federal claims. In *England* the

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[3] *England v. L.A. State Bd. of Med. Exam'rs*, 375 U.S. 411, 417, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

[4] *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

> Court noted that a party "may accomplish [a reservation of federal claims] by making on the state record the 'reservation' to the disposition of the entire case by the State Courts." 375 U.S. at 421, 84 S.Ct. at 461.
>
> Nevertheless, the Court did not specify a form for the reservation and cautioned that an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than required and fully litigated his federal claim in State Courts. *Los Altos El Grenada Investors v. City of Capitola*, *supra*, at 688.

With states now undertaking challenges to federal law and emphasizing the sovereignty of state law, a re-examination of the power distribution between the states and the federal law designed to enforce federal constitutional rights a re-examination of *Migra* and its prodigy is long overdue.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Dated: February 23, 2011

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR STEWARD, Plaintiff-Appellant, v. TOWN OF PARADISE, Defendant-Appellee.	No. 09-17089 D.C. No. 2:08-cv-02622-LKK-CMK MEMORANDUM* (Filed Dec. 7, 2010)

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted November 3, 2010
San Francisco, California

Before: NOONAN and PAEZ, Circuit Judges, and DUFFY, District Judge.**

Appellant Arthur Steward appeals from an order by the district court granting summary judgment in favor of Appellee, the Town of Paradise of Paradise,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

on his 42 U.S.C. § 1983 claims alleging as consitutional [sic] violations a taking of his property without due process, and inverse condemnation without just compensation. The district court granted summary judgment on the basis that Steward's federal claims were subject to claim preclusion based on prior state court judgments. We affirm.

Analysis

We review a grant of summary judgment de novo. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). "A district court's ruling on claim preclusion is also reviewed de novo." *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9th Cir. 2007). "Claim preclusion is a broad doctrine that bars bringing claims that were previously litigated as well as some claims that were never before adjudicated." *Holcombe*, 477 F.3d at 1097 (quoting *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 327 (9th Cir. 1995)). The Supreme Court has held that a state-court judgment "has the same claim-preclusive effect in [a federal § 1983 case] that the judgment would have in [the applicable] state court[ ]." *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 85 (1984). In *Migra*, the Court "rejecte[ed] [sic] the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case." *Id.* at 84.

We apply California law of claim preclusion to the judgments at issue, as the underlying judgments in this case were rendered in California. *See San*

Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys., 568 F.3d 725, 734 (9th Cir. 2009) (applying California claim preclusion law to determine the effect of a California judgment in a subsequent federal case). Under California's claim preclusion doctrine, "three requirements have to be met: (1) the second lawsuit must involve the same 'cause of action' as the first one, (2) there must have been a final judgment on the merits in the first lawsuit and (3) the party to be precluded must itself have been a party, or in privity with a party, to that first lawsuit." *Id.* The parties do not dispute that the same parties are involved in the state cases and the federal case. It is clear that Steward had a fair opportunity to litigate his claims in state court.[1]

I. Same Cause Of Action

Under California law, whether two cases involve the same "'cause of action' for purposes of res judicata" is determined "by analyzing the primary right

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[1] After dismissing Steward's first and second amended complaints, discussed *infra*, the state court subsequently granted summary judgment for the Town of Paradise and against Steward on all of his remaining claims except his conversion claim. The state court expressly rejected Steward's "argument, with citation to authorities, that a city can be liable for interfering with access of an abutting landowner to a public street," finding that "the authorities are not applicable because [Steward] was not and is not an abutting landowner; his property is not directly adjacent to a public street open to automobile traffic." Steward abandoned his appeal of these state-court decisions and filed this separate federal action instead.

at stake." *San Diego Police Officers' Ass'n*, 568 F.3d at 734. Specifically, "if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Id.* (quoting *Eichman v. Fotomat Corp.*, 197 Cal. Rptr. 612, 614 (1983)).

The district court properly determined that Steward's federal lawsuit involves the same "cause of action" as his prior state court litigation. The state court litigation and the current federal suit seek to vindicate the same primary rights – Steward's right to be free from economic injury to his property interest allegedly caused by the Town of Paradise of Paradise's taking of his right to cross the railroad easement and/or the denial of access to his mobile home property – and these rights were alleged in Steward's state court lawsuit. Further, Steward alleged no new facts in his federal case that would change the analysis from the state court's judgments.

II. Final Judgment On The Merits

The district court also properly concluded that the state court judgments were "on the merits" under California law. The state court dismissed Steward's first amended complaint for failure to allege facts sufficient to constitute a cause of action. The state court also dismissed the inverse condemnation claim

presented in Steward's second amended complaint for failure to allege facts sufficient to constitute a cause of action. The state court next granted summary judgment in favor of the Town of Paradise on all except one remaining claim in Steward's second amended complaint. The remaining claim (which is not relevant here) was settled by the parties. Thus, the state court effectively passed on the merits of Steward's claims under California law. *See Sterling v. Galen*, 51 Cal. Rptr. 312, 315 (Cal. Ct. App. 1966). Steward's first amended complaint, in relevant part, pleaded that: (1) the Town of Paradise deprived him of use of his private driveway and culvert for ingress and egress to his property, loss of earning capacity of his mobile home park, and loss of marketable value of his real property; and (2) the Town of Paradise violated his due process rights when it took and destroyed his driveway and culvert without notice or a hearing, causing him damage as alleged in the complaint. Steward's second amended complaint also alleged loss of market value of his real property, loss of development and economic value of his mobile home park, and that the Town of Paradise of Paradise's substantial impairment of access to his property constituted an inverse condemnation.

Thus, the state court judgments in this case constituted final judgments on the merits entitled to claim preclusive effect. *Sterling*, 51 Cal. Rptr. at 315 (citing *Crowley v. Modern Faucet Mfg. Co.*, 282 P.2d 33, 34-35 (Cal. 1955)). Accordingly, we affirm the district court's grant of summary judgment on the

ground that Steward's federal claims are subject to claim preclusion based on prior state court judgments.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTHUR STEWARD,

Plaintiff,

v.

TOWN OF PARADISE,

Defendant.

/

NO. CIV.
S-08-2622 LKK/CMK

ORDER

Plaintiff brings a 42 U.S.C. section 1983 claim for unlawful taking and a state law claim for inverse condemnation against defendant Town of Paradise. Defendant moves for summary judgment on the grounds of claim preclusion, issue preclusion, and the statutes of limitations. For the reasons stated below, the court concludes that all of plaintiffs' claims are claim precluded by prior state court judgments.

I. BACKGROUND

Plaintiff owns a mobile home park in Paradise, Calif., and an adjacent residential property. Plaintiff formerly accessed the residential property by crossing a railway, pursuant to a license from the railroad; plaintiff additionally maintained a culvert across the railway. Defendant purchased the railroad's right-of-way, which defendant used to construct a recreational trail. In 1988, defendant informed plaintiff that the license had been revoked and directed plaintiff to

remove the driveway and culvert. When plaintiff did not do so, defendant caused the two to be removed.

Protracted state court litigation followed. Plaintiff's first suit was filed in state court on November 27, 1989. This suit brought claims for, inter alia, fraud, trespass, conspiracy, conversion, violation of civil rights, and declaratory relief. In this state suit, plaintiff alleged three sources of a right to the disputed property. First, he claimed to have an irrevocable license, RFJN Ex. A. Second, he amended his complaint to allege a prescriptive easement, Def.'s Request for Judicial Notice ("RFJN") Ex. B, 6, 9. Third, in 1992, he purchased a quitclaim deed to the property underlying the railway easement from Barbara Edwards, and plaintiff incorporated this claim to the property into the initial lawsuit. *See id.* Ex. E, 6-7. Plaintiff also brought claims for conversion, fraud, and denial of due process. The Conversion claim alleged that defendant had unlawfully taken his personal property associated with the culvert, *id.* Ex. B, 8. The fraud claim alleged that defendant fraudulently represented that it owned the property underlying the railway, when in fact it did not have fee title to the property. *Id.* Ex. B, 4. The due process claim alleged that defendant failed to give plaintiff proper notice and hearing before destroying the culvert and crossing. *Id.* Ex. B, 10.

The initial lawsuit resulted in a series of judgments, including a state court appeal. On August 8, 1995, the trial court concluded that plaintiff had no property interest of any sort in the subject property or

crossing. Def.'s UF 7; Def.'s RFJN Ex. D. This judgment was affirmed by California's Third District Court of Appeal on February 3, 1997. Def.'s UF 8; Def.'s RFJN Ex. E. However, the appellate court concluded that plaintiff could proceed on any claims that did not depend on plaintiff's ownership of an interest in the property. *Id.*

This first state court suit was then either stayed or proceeded without an entry of judgment for a number of years. In the interim, plaintiff separately sought to purchase fee title to the property underlying the railway. Plaintiff acquired two quitclaim deeds, both from potential heirs of Rosslyn Jones, on September 27, 1999 and September 20 or 21, 2002. Def.'s UF 9, 10. Plaintiff then instituted a second state court action asserting quiet title to the property on this basis. The first state court action was further stayed pending this quiet title proceeding. In the quiet title action, a jury found that plaintiff had acquired fee title to the underlying property. On March 14, 2005, the California Third District Court of Appeal upheld this verdict, but found that defendant had acquired a vested right to use the railway as a recreational trail. Def.'s RFJN Ex. H.

After the conclusion of the appeal in the second suit, the stay in the first suit was lifted. After a motion for judgment on the pleadings, plaintiff filed a Second Amended complaint in the first state court suit. Def.'s UF 13. This complaint brought claims for fraud, alleging that defendant misrepresented in 1988 that it had acquired fee title to the subject

property; RFJN Ex. J, ¶ 8; inverse condemnation based on defendant's 1988 conduct; *Id.* ¶ 15-16; conversion based on taking of pipes, etc. in 1988, *Id.* ¶ 21; for intentional interference with contract; and for declaratory judgment that plaintiff has owned an easement for the license since 1974, *Id.* ¶ 29. The amended complaint did not refer to plaintiff's purchase of quitclaim deeds in 1999 or 2002, or to plaintiff's subsequent quiet title action. Instead, the allegations in the amended complaint only concern conduct through 1988.

Subsequent state court judgments resolved all five of plaintiff's claims in this first suit (proceeding on the second amended complaint) against plaintiff. By order of January 26, 2007, the state trial court granted judgment on the pleadings to defendant as to plaintiff's inverse condemnation and interference with contract claims, "based on the rulings from the Court of Appeals." Def.'s RFJN Ex. K. On December 17, 2007, the state trial court granted summary judgment to defendant on the fraud and declaratory relief claims, finding that defendant was immune from the fraud claim under Cal. Gov. Code § 818.8; Def.'s RFJN Ex. L, 5, and that plaintiff had failed to show that he was entitled to the easement by necessity that plaintiff sought under the declaratory judgment claim, *id.* at 6. The remaining claim, for conversion, was resolved by stipulation of the parties, in a judgment entered on March 28, 2008. Plaintiff appealed these judgments with respect to the fraud, inverse condemnation, interference with contract, and declaratory

judgment claims. Def.'s UF 17. This appeal was dismissed on November 21, 2008, for plaintiff's failure to file an opening brief. *Id.*

Plaintiff filed this federal court action shortly before the state dismissal of the appeal, on November 3, 2008. In this complaint, plaintiff alleges that defendant falsely "claimed the right-of-way property [was] . . . town property," "forcibly removed the driveway, depriving Plaintiff of access to a public thoroughfare, effectively land-locking Plaintiff's 'residence,'" and "refused to restore Plaintiff's drive or to return to Plaintiff the pipes, culverts and other property it removed" Compl. ¶¶ 6-7. These allegations all pertain to conduct prior to or during 1988. The complaint alleges that plaintiff "purchased the property from [Barbara] Edwards," Compl. ¶ 7, without specifying when this occurred, but makes no mention of plaintiff's later purchase of quitclaim deeds from the Jones heirs or the 2003 quiet title action. These allegations are incorporated into two claims for relief. The first is for "Taking of Property without Due Process" under 42 U.S.C. section 1983. Plaintiff alleges that defendant "has taken Plaintiff's property, damaged [the] value of Plaintiff's property, limited Plaintiff's quiet enjoyment of his property, damaged the profitability and growth of Plaintiff's business all without due process of law and in violation of Plaintiff's rights under the California and United States Constititon[s] [sic]." Compl. ¶ 12. The second claim is for inverse condemnation, makes similar allegations, including that defendant "is required by law to pay

just compensation to Plaintiff for damage [to] or taking of Plaintiff's property rights." Compl. ¶ 14.

Defendant moves for summary judgment on three grounds: that these claims are claim precluded, that these claims are issue precluded, and that these claims are brought outside the statute of limitations.

II. STANDARD FOR A FED. R. CIV. P. 56 MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970); *Poller v. Columbia Broadcast System,* 368 U.S. 464, 467 (1962); *Jung v. FMC Corp.,* 755 F.2d 708, 710 (9th Cir. 1985); *Loehr v. Ventura County Community College Dist.,* 743 F.2d 1310, 1313 (9th Cir. 1984).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of

proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its

contention that the dispute exists. Rule 56(e); *Matsushita,* 475 U.S. at 586 n.11; *First Nat'l Bank,* 391 U.S. at 289; *Strong v. France,* 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson,* 242 U.S. 248-49; *Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank,* 391 U.S. at 290; *T.W. Elec. Serv.,* 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita,* 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); *International Union of Bricklayers v. Martin Jaska, Inc.,* 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any. Rule 56(c); *Poller,* 368 U.S. at 468; *SEC v. Seaboard Corp.,* 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, *Anderson,* 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita,* 475 U.S. at 587 (citing *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962) (per curiam)); *Abramson v. Univ. of Haw.,* 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines,* 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd,* 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita,* 475 U.S. at 587 (citation omitted).

III. ANALYSIS

Because this court concludes that plaintiff's claims are claim precluded, the court does not address the parties' arguments regarding issue preclusion and the statute of limitations.

In this case, California claim preclusion law determines both whether the state and federal claims

are precluded. In a recent analogous case, the Ninth Circuit held that when there was a prior state court proceeding in which a section 1983 claim could have been brought, but was not, the state's preclusion law would determine whether the section 1983 claim was precluded in a subsequent federal suit. *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9th Cir. 2007) (citing *Migra v. Warren City School Dist Bd. of Educ.*, 465 U.S. 75, 81, 83-85 (1984)). Here, plaintiff's claims, including plaintiff's Fifth Amendment takings claim, could have been litigated in state court. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 346 (2005).

In another Ninth Circuit case interpreting California's law of claim preclusion, the court explained that there are three requirements for a claim to be precluded:

> (1) the second lawsuit must involve the same "cause of action" as the first one,
>
> (2) there must have been a final judgment on the merits in the first lawsuit and
>
> (3) the party to be precluded must itself have been a party, or in privity with a party, to that first lawsuit.

San Diego Police Officers' Ass'n v. San Diego City Emples. Ret. Sys., 568 F.3d 725, 734 (9th Cir. 2009) (citing *Le Parc Cmty. Assn v. Workers' Comp. Appeals Bd.*, 110 Cal. App. 4th 1161 (2003)). In this case, the third requirement is met, as the parties in the instant case and in the prior two state cases are identical.

Plaintiff mistakenly argues that the second requirement has not been met, or that claim preclusion is otherwise inappropriate, because the state proceedings did not provide a "full and fair opportunity" to litigate the issues. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480 (1982); *id* at 481 n.22. However, plaintiff's arguments simply express disagreement with the state courts' resolution of the merits – namely, the state court's conclusion that plaintiff's pertinent property was "not directly adjacent to a public street." Pl.'s Opp'n at 4. Notably, eight of the fifteen pages in plaintiff's opposition memorandum are devoted to this argument. *Id.* 3-10. Similarly, plaintiff faults the state trial court's determination that, because plaintiff did not have a property interest in the crossing, plaintiff could not state an inverse condemnation claim relating to any of plaintiff's properties. Whatever the merits of this determination, it is one that was made by the state trial court in the course of ordinary state court proceedings, and any challenge to the merits thereof could only be brought in the state court of appeal. Plaintiff has not shown that "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kremer*, 456 U.S. at 481 (quoting *Montana v. United States*, 440 U.S. 147, 164 (1979)).

Plaintiff separately argues that the instant suit involves a "cause of action" separate from the state suits. California law defines "cause of action" by analyzing the "primary right" at stake. *San Diego Police Officers Ass'n*, 568 F.3d at 734.

> [I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.

Id. (quoting *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170, 1174-75 (1983)).

> The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict [sic] or act of wrong. If the same primary right is involved in two actions, judgment in the first bars consideration not only of all matters actually raised in the first suit but also all matters which could have been raised.

Eichman, 147 Cal. App. 3d at 1175 (citations and quotations omitted). *Eichman* resolves the issue here. The facts underlying both the instant and prior suits are defendant's 1988 revocation of plaintiff's license to cross the railway, and defendant's related conduct. The duties plaintiff seeks to enforce are related to deprivation of property, diminishment of property value, and compensation for the same. Although plaintiff invokes federal laws in this suit, these added theories of recovery do not alter the "primary rights" analysis. Further, as noted above, plaintiff's section 1983 claim

could have been brought in state court. *San Remo Hotel,* 545 U.S. at 346, *Migra,* 465 U.S. at 84.[1]

The conduct underlying the two claims here, and the primary rights arising therefrom, are entirely duplicative of the rights asserted in plaintiff's second amended complaint in plaintiff's first state court proceeding, and in particular, the inverse condemnation claim presented therein. The inverse condemnation claim plaintiff presented to the state court (together with plaintiff's other state court claims) invoked the same primary rights as the claims here. Accordingly, the court concludes that plaintiff's claims are barred by claim preclusion.

IV. CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATED: September 1, 2009.

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[1] In this case, nothing indicates an attempt by plaintiff during the state proceedings to explicitly preserve a federal claim for future adjudication, and this court does not resolve what effect, if any, such an attempt would have on the claim preclusive effects of the prior proceedings. *See San Remo Hotel, L.P. v. City & County of San Francisco,* 545 U.S. 323, 336, 347 (2005), *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 195 (1985).

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(2)

No. 10-1063

Supreme Court, U.S.
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In The

Supreme Court of the United States

ARTHUR STEWARD,

Petitioner,

v.

TOWN OF PARADISE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is a litigant who elects to submit his federal constitutional claims to a California state court free to thereafter re-litigate the same primary right issues in federal court after an adverse result in state court?

LIST OF PARTIES

All of the parties to this proceeding are listed in the caption.

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the trial court's granting of respondent's motion for summary judgment, has not been reported. It is reprinted in Appendix A of the petition.

The order of the U. S. District Court for the Eastern District of California granting summary judgment in favor of respondent has not been reported. It is reprinted in Appendix B of the petition.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit was entered on December 7, 2010. Petitioner filed his certiorari petition on February 23, 2011. Petitioner invokes jurisdiction of this court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution – Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution – Fourteenth Amendment

All persons born or naturalized in the United Sates, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, except that in any action brought against a judicial officer for

> an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a Statute of the District of Columbia.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On November 3, 2008, Steward filed his complaint for damages in the United States District Court for the Eastern District of California. Said complaint purported to state two claims, a First Claim for taking of property without due process under 42 U.S.C. § 1983, and a Second Claim for taking of property without just compensation, based on inverse condemnation.

On November 21, 2008, the California Third District Court of Appeal dismissed Steward's third state appeal for failure to file an opening brief.

On September 1, 2009, the District Court granted Town's motion for summary judgment, based on a finding that Steward's claims were barred as they already had, or could have, been adjudicated in State Court.

On December 7, 2010, the Court of Appeals for the Ninth Circuit affirmed the U. S. District Court's granting of the Town's motion for summary judgment.

II. FACTS RELEVANT TO THE PETITION

Steward was the owner of three contiguous parcels in Paradise, Butte County, California, bounded on the west by a public road known as The Skyway and on the east by an old Southern Pacific right-of-way. Berkshire Way, another public road, lies east of the railroad right-of-way.

Prior to 1986, Steward had a license from Southern Pacific to cross the railroad's right-of-way. The license was revocable upon 30 days notice. Based on the license, Steward put in a drainage culvert and maintained a private driveway across the right-of-way.

In April of 1986, the railroad deeded the right-of-way to the Town, thereby revoking Steward's license. The Town was acquiring the right-of-way for the purpose of putting in a recreational trailway.

Starting in 1988, the Town requested Steward to remove the driveway and culvert, but he refused. After continuing requests from the Town and continuing refusals by Steward, the Town removed the culvert and crossing on approximately March 23, 1988.

Over twenty (20) years of litigation ensued in the trial and Appellate Courts of California, primarily in

Steward v. Town of Paradise, Butte County Superior Court Case No. 104360 (phase I), filed November 27, 1989; *Steward v. Town of Paradise*, Butte County Superior Court Case No. 123908, filed December 10, 1999; and *Steward v. Town of Paradise*, Butte County Superior Court Case No. 104360 (phase II), filed September 4, 1991.

All of Steward's allegations against the Town centered on one single act, the Town's removal of the culvert and crossing in 1988. Causes of action pled included claims for fraud and deceit, trespass, conspiracy, intentional interference with contract, quiet title, conversion, inverse condemnation and violation of U. S. constitutional rights.

After three California trials, two by court and one by jury, and three California appeals, counting the one recently abandoned by Steward, several relevant determinations emerged:

(1) Steward had no property interest of any kind in the railroad right-of-way, until September of 2002, when he obtained a quitclaim deed from the heirs of Rosslyn Jones, who had been determined to be the owners of the underlying fee in the railroad right-of-way.

(2) Town had no property interest in the railroad right-of-way until March 23, 1993, when it acquired a vested right to use the right-of-way for recreational trailway purposes pursuant to California Civil Code § 1009.

(3) Other than Steward's claim for conversion, based on removal of his culvert, which claim was resolved by stipulation of the parties, all of the other Steward claims through the State Court proceedings, including inverse condemnation and violation of U. S. constitutional rights, were adjudicated adversely to him.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED BECAUSE PETITIONER ELECTED TO SUBMIT HIS FEDERAL ISSUES TO STATE COURT AND ONLY SOUGHT RELIEF IN FEDERAL COURT AFTER AN ADVERSE JUDGMENT IN STATE COURT

In the case at bar, Steward alleges that in 1988, the Town wrongfully removed his private crossing over the railroad right-of-way abutting the eastern boundary of his property. He claims that the removal constitutes a taking without due process of law (first claim) and that such taking is actionable under an inverse condemnation theory (second claim).

Both of those issues were adjudicated adversely to Steward in the California trial court. The federal civil rights claim, which was the Sixth Cause of Action in the First Amended Complaint in *Steward v. Town of Paradise*, Butte County Superior Court Case No. 104360, was eliminated when Judge Kelly granted the Town's motion for judgment on the pleadings on

October 27, 2006; and the inverse condemnation claim, which was the Second Cause of Action in the Second Amended Complaint in *Steward v. Town of Paradise*, Butte County Superior Court Case No. 104360, was eliminated when Judge Kelly granted the Town's motion for judgment on the pleadings on January 26, 2007.

A judgment on the pleadings, if it attacks the sufficiency of a complaint in stating a cause of action, serves the same function as a general demurrer. *MacIsaac v. Pozzo*, 26 Cal.2d 809 (1945); *Tiffany v. Sierra Sands Unified School District*, 103 Cal. App. 3d 218, 222 (1980); *Orange Unified School District v. Rancho Santiago Community College District*, 54 Cal. App. 4th 750, 764 (1997). And a judgment following the sustaining of a general demurrer is on the merits and provides the basis for res judicata. *Pollock v. University of Southern California*, 112 Cal. App. 4th 1416, 1427-1428 (2003); *Ojavan Investors, Inc. v. California Coastal Commission*, 54 Cal. App. 4th 373, 383-384 (1996); *Kanarek v. Bugliosi*, 108 Cal. App. 3d 327, 334 (1980).

The following principles, which are apropos to the present discussion, are found in the Ninth Circuit case of *Holcombe v. Hosmer*, 477 F.3d 1094 (9th Cir. 2007). That case involved the question of whether an adverse judgment in a prior Nevada state court proceeding in which a section 1983 claim could have been brought, but was not, precluded the bringing of a section 1983 claim in federal court. The following discussion began on page 1098:

I. Claim preclusion bars litigation of claims that were or could have been raised in a prior action, including claims under § 1983.

[1] "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U. S. 90, 93 (1980). "Claim preclusion is a broad doctrine that bars bringing claims that were previously litigated as well as some claims that were never before adjudicated." *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 327 (9th Cir. 1995).

[2] Claims under 42 U.S.C. § 1983 are subject to claim preclusion even if the litigants do not actually litigate the federal claim in state court. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U. S. 75, 83-85 (1984) (holding that petitioner's § 1983 claim is subject to claim preclusion); *Allen*, 449 U. S. at 97-99 (discussing history of § 1983 and rejecting argument that Congress exempted § 1983 claims from preclusion by state court judgments). In *Migra*, the Supreme Court specifically rejected the argument that a § 1983 claim that could have been, but was not raised in a state-court proceeding can avoid the preclusive effect of res judicata. *Migra*, 465 U. S. at 84-85. Therefore, Holcombe's § 1983 claim is not exempt from preclusion under the doctrine of claim preclusion.

II. Under Nevada law, Holcombe's § 1983 claims are precluded by the state court judgment.

A. Federal courts must apply Nevada law concerning claim preclusion to a prior Nevada state court judgment.

[3] "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered" under the Constitution's Full Faith and Credit Clause and under 28 U.S.C. § 1738. *Id.* at 81. Accordingly, the court applies Nevada law concerning claim preclusion to the Nevada judgment.

Based on the above principles, it is clear that the federal courts must apply California law concerning claim preclusion to the case at bar. The claim preclusion aspect of *res judicata* under California law is set forth in *Mycogen Corporation v. Monsanto Chemical*, 28 Cal.4th 888 (2002), as follows:

Res judicata describes the preclusive effect of a final judgment on the merits. *Res judicata*, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them . . . A clear and predictable *res judicata* doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a

> single suit; if not brought initially, they may not be raised at a later date.

California law defines a "cause of action" for *res judicata* purposes by analyzing the primary right at stake. A "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. *LeParc Community Association v. Workers' Compensation Appeals Board*, 110 Cal. App. 4th 1161, 1170 (2003).

As the court in *Tensor Group v. City of Glendale*, 14 Cal. App. 4th 154, 160 (1993), puts it:

> If two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.

Eickman v. Fotomat Corporation, 147 Cal. App. 3d 1170 (1983), adds further clarification at page 1175:

> The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong. If the same primary right is involved in two actions, judgment in the first bars consideration not

> only of all matters actually raised in the first suit but also all matters which could have been raised.

The facts underlying the instant action, as well as the prior actions in the state courts, are precisely the same – the Town removed Steward's culvert and crossing in 1988. The same primary right litigated in state court is being invoked again in federal court. Thus, Steward's federal action is barred by the doctrine of claim preclusion.

Steward is not aided in his petition by his reference to *Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674 (9th Cir. 2009) and *England v. L. A. State Board of Medical Examiners*, 375 U. S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). The plaintiffs in both of those cases initiated their lawsuits in federal courts, where they were then directed to state court. The Los Altos plaintiffs expressly reserved in state court their right to pursue the federal questions in federal court. The *England* plaintiffs were excused from making such an express reservation in state court, as the law at that time was somewhat unsettled and they had been forced into state court only after invoking federal jurisdiction.

In contrast, Steward chose to invoke the jurisdiction of the state court at the outset, and he submitted his federal civil rights claim to the state court. It was only after receiving an adverse result in state court that he decided to try again in federal court. This is a classic case of forum shopping.

II. CERTIORARI IS NOT WARRANTED AS THERE ARE NO COMPELLING REASONS UNDER U. S. SUPREME COURT RULE 10 TO GRANT THE PETITION

Steward cites no cases in which a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter (Rule 10(a)); nor does Steward cite any cases in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals (Rule 10(b)); nor does Steward cite any cases in which a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court (Rule10(c)).

Further, it should be noted that the entire section of Steward's petition entitled, "Reasons Why Certiorari Should Be Granted," centers on a discussion of California law on the rights of abutting owners. Steward is essentially arguing that this Court should grant certiorari because the California trial court erred in its application of California law. That does not constitute grounds for the granting of a certiorari petition. As is stated in U. S. Supreme Court Rule 10:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

CONCLUSION

Steward has raised no compelling reasons under Rule 10 for granting his petition for a writ of certiorari. Therefore, the petition should be denied.

Respectfully submitted,

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